

) Case No. 3:08-cv-03894-SI
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)
) **MOTION FOR DIRECTED**
) **VERDICT ON DEFENDANTS'**
) **EXEMPTION AFFIRMATIVE**
) **DEFENSE**
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)
) **Trial Date: 10/24/11**
) **Dept.: Courtroom 10, 19th Floor**
) **Judge: Hon. Susan Illston**
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1	JOHN T. BAHR, et al.,)	Case No. 3:10-cv-00628 SI
2)	
3	Plaintiffs,)	MOTION FOR DIRECTED
4	vs.)	VERDICT ON DEFENDANTS'
5)	EXEMPTION AFFIRMATIVE
6	SERVICEMASTER GLOBAL)	DEFENSE
7	HOLDINGS, INC.; THE)	
8	SERVICEMASTER COMPANY, INC.;)	Trial Date: 10/24/11
9	THE TERMINIX INTERNATIONAL)	Dept.: Courtroom 10, 19 th Floor
10	COMPANY, L.P., AND TERMINIX)	Judge: Hon. Susan Illston
11	INTERNATIONAL, INC., AND DOES 1-)	
12	20, inclusive,)	
13)	
14	Defendants.)	
15)	

I. INTRODUCTION

Defendants have not presented any evidence supporting their exemption affirmative defense. In order to prove their affirmative defense, defendant's need evidence supporting their contention that Plaintiff's worked more than fifty percent of their time outside the office on sales activities under the *Ramirez* standard. Based upon their trial presentation, defendants' will argue that when Plaintiffs were engaged in a termite inspection and report writing, that activity constituted a sales activity.

However, defendants have only presented evidence that termite inspections were part of a "sales process." Whether or not an activity is part of a sales process is irrelevant and does not meet the standard provided in *Ramirez v. Yosemite Water Company, Inc.*, (1999) 20 Cal.4th 785. Every witness who testified regarding inspections testified the inspection itself is a service. Inspections were also characterized by defendants as "labor" on the ten dollar renewal inspection

1 payments. The admitted fact that inspections are a service precludes them being
2 considered a sales activity. Here, however, there is no evidence supporting any
3 inference that a person doing only the service or labor of an inspection would be
4 considered a salesperson. Thus, Plaintiffs' motion for a directed verdict regarding
5 defendants' exemption affirmative defense should be granted.

6 II. STATEMENT OF FACTS

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8 Defendants' case consisted of two witnesses. Andris Zoltners was offered as
9 an expert witness regarding sales. He testified that an inspection is a service.
10 Further, he did not testify that a termite inspection considered separately from any
11 other activity could be considered sales. He merely said that an inspection was part
12 of a sales process and that an inspection could be considered part of that sales
13 process once you were provided with the context that the inspector was paid a
14 commission.

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16 Vic Charles from ServiceMaster and Terminix's own human resources
17 department was defendants' only other witness. He too testified that an inspection is
18 a service. He provided no testimony that an inspection itself is a sales activity.
19 Pointedly, he testified that defendants employed "renewal" or "re-inspection"
20 inspectors who perform inspections, are not considered sales people (though they
21 can make sales) and are not classified as exempt.

22 III ARGUMENT

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24 This Court held that the question of whether an activity can be categorized as
25 a sales or non-sales activity is governed by *Ramirez*. (Docket No. 295, 4:9-16.) The
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1 Ramirez Court found that the "predominant controversy is the precise meaning of the
2 term 'outside salesperson,' a question of law." *Ramirez v. Yosemite Water Company,*
3 *Inc.*, 20 Cal.4th 785, 790 (1999). In its recent order, this Court noted that the
4 Ramirez Court's question was "answered by providing a test — looking at an activity
5 in isolation, would a person who performs only that task be considered a
6 salesperson?" (Docket No. 295, 4:11-13 (citing *Ramirez*, 20 Cal. 4th at 802).) Under
7 this Court's recent order, the jury in this case must apply *Ramirez* and determine
8 whether termite inspections and inspection reports are sales or non-sales activities.
9 The jury must consider each activity separately and determine whether a person
10 performing *only* this activity is a salesperson.

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12 The only evidence presented in this case is that an inspection is part of a sales
13 process. There is nothing in evidence that would allow the jury to infer that a person
14 *only* performing inspections could be considered a salesperson.

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16 The Court in its order denying the Defendants' motion for partial summary
17 judgment responding to Defendants' contention that "pest inspections and pest
18 control sales are integrally intertwined," held that the California pest control laws'
19 definition of a "structural pest control field representative," which includes a list of
20 various activities, does "not somehow transform termite inspections into sales
21 activity." (Docket No. 203, 11: 13-19.) Therefore, any evidence of what occurred
22 outside of an inspection can be considered in determining whether the inspection is a
23 sales activity.
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IV. CONCLUSION

There is no evidence supporting any inference that the inspection alone could be considered sales activity. Thus, Plaintiffs' motion for a directed verdict regarding defendants' exemption affirmative defense should be granted.

DATED: October 27, 2011

HERSH & HERSH

By: 

Nancy Hersh
Attorneys for Plaintiffs